



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

PAKISTAN
IAA reference: IAA20/08366

Date and time of decision: 17 June 2020 16:43:00
C Wilson, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Pashtun Turi Shia from Parachinar, Pakistan. He arrived in Australia [in] July 2013 as an unauthorised maritime arrival. He applied for a Safe Haven Enterprise Visa (SHEV) on 26 April 2017.
2. A delegate of the Minister for Home Affairs (the delegate) refused the application on 5 May 2020. The delegate did not accept the applicant faced a real chance or real risk of harm for reason of his ethnicity, religion, playing musical instruments, or returning as a failed asylum seeker from a western country.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a single man of Pashtun ethnicity, from the Turi tribe, and a Shia Muslim. He is from a village near Parachinar, Kurram Agency, in the former Federally Administered Tribal Area (FATA) now Khyber Pakhtunkhwa province.
 - The applicant's home village was a mixed village, with both Shia and Sunni families. However the Sunni families relocated after the conflict between Shias and Sunnis escalated from 2006.
 - He went to school up to [a specified grade] but had to withdraw from school in 2006 because at that time schools in his area were threatened by the Taliban. His older brother was told by some Sunni villagers that the applicant was not safe at school. He stayed at home from 2006 to 2011, and only worked from 2011 to 2013 as [an occupation].
 - In 2006 the Taliban attacked his [village]. The family fled to a nearby safe village for a few days.
 - The applicant left Pakistan because of the difficulties caused by the conflict. Every day he feared for his life and couldn't live and work safely in the Kurram Agency.
 - If he is returned to Pakistan he fears he will be harmed, even killed, because he is a Shia Muslim from the Parachinar area. He fears harm from the Taliban and the Islamic State of Iraq and Syria (ISIS).
 - Since he has been in Australia he has been playing musical instruments with friends, such as [various music instruments]. There are videos of him playing music with friends on [social media]. Because of these videos his older brother has received threats from Sunnis saying they know the applicant is playing music. He will be harmed if he returns to Pakistan for playing musical instruments.

- He has become used to a western life and would find it difficult to return to his old life. He will be targeted for having lived in a western country.

Refugee assessment

6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. I accept the applicant is a citizen of Pakistan, based on the identity documents he provided to the Department, including his passport. I find Pakistan is his receiving country. In Pakistan he lived all his life in his home village near Parachinar. His parents and three of his brothers still live there, with one brother in [Country 1] and his sisters living in nearby villages with their husbands. I find his village near Parachinar in Kurram Agency is the place he is likely to return to.
9. The applicant has consistently claimed to be of Pashtun ethnicity, from the Turi tribe, and a Shia Muslim. The delegate questioned him about his ethnicity, tribe and religion and the applicant gave a plausible account of his claimed background. I accept he is a Pashtun Shia Turi from a village in Kurram Agency.
10. At his Entry Interview in August 2013 the applicant said he came to Australia because of the poor security situation in Pakistan, including bomb blasts, suicide attacks and abductions. He said nothing had happened to him, but he feared the situation would get worse. In his SHEV application he claimed to have been targeted by the Taliban because he had gone to school. The delegate was critical of this not being raised in the Entry Interview, however I am not concerned by the apparent inconsistency or omission. I accept that he was told to be brief in his Entry Interview and may not have given a full account of his experiences in Pakistan. Further, if he was threatened or targeted by the Taliban as now claimed, in fact nothing did

happen to him. I accept it was therefore it was not inconsistent for him to have previously said nothing happened to him, and later claim a threat was made.

11. I have concerns however about the genuineness of the claim to have been singled out by the Taliban for other reasons. His basis for saying he was targeted by the Taliban is that he says some Sunni villagers told his older brother the applicant was not safe at school. This does not sound like a threat directed at the applicant, but rather a friendly warning from other villagers that the Taliban were targeting schools in the area, and for this reason the applicant may not be safe. He says the Sunnis in his village provided shelter to the Taliban and were a source of information, but there is no claim or evidence the Sunnis in his village ever harmed the applicant, his family or other Shia families living there. The applicant says that prior to 2006 the Shia and Sunni families in his village lived together peacefully, and he recalls playing cricket and otherwise mixing with them. Given this background I consider it more likely the 'threat' to the applicant delivered to his older brother was a friendly warning from concerned villagers that the applicant may not be safe if he continued going to school because the Taliban were targeting schools, rather than a threat to harm him or that the Taliban had singled him out.
12. At his SHEV interview the applicant said that because he was indirectly threatened by the Taliban in 2006 for going to school, he remained a target until he left Pakistan. He claimed he was the only person in his family targeted by the Taliban, because his younger siblings were not enrolled at school. The applicant was still a child when he quit school. He would have been one of many children in villages near Parachinar who were at school at that time and withdrawn from school for safety reasons. Even if the Taliban were particularly targeting schools, I do not accept an ordinary child kept home from school remained of adverse interest to the Taliban. I do not accept that if he returned in the reasonably foreseeable future that anyone associated with the Taliban or other Sunni extremist groups would have an adverse interest in him for having gone to school in or prior to 2006.
13. The applicant claims threats have been made to his brother because the applicant has been recorded playing music in Australia. He said the threats occurred sometime since he lodged his SHEV application in 2017, and that is why he did not mention it in the application. The applicant says playing musical instruments is considered a *haram* activity by the Taliban, that is, something forbidden by Islamic law and is also generally considered undesirable by his family and community. He says videos of him playing music with friends have been uploaded to the internet, on sites such as [social media sites]. He provided links to videos on [social media] to the Department which were posted in 2017 and 2018. Given he was playing musical instruments with others in 2017, and if indeed such activity would be considered *haram* in his home area, he has failed to explain why there was no mention at least of his interest in playing musical instruments in his application lodged in 2017.
14. I have viewed the videos and a person who appears to be the applicant does appear in them. He is not named or otherwise identified however. The videos were not uploaded by him nor linked to any social media account owned by him. I consider it farfetched extremists in Pakistan would have stumbled across these videos, never mind been able to identify the applicant in them. The applicant says Sunnis who used to live in his village, but relocated to other cities, were the ones who called his brother to say they knew the applicant was doing *haram* activities in Australia. He has not explained how Sunnis formerly from his village would have knowledge of these videos. He does not claim to be in contact with Sunnis formerly from his village through social media. The people he plays with in Australia are people he met here, not from his village, and there is nothing to indicate they or whoever posted the videos would know the Sunnis who used to live in his village and have shared the videos this way. I consider it farfetched Sunnis who used to live in his village are aware of these videos. I consider this claim

is an embellishment. I do not accept Sunnis formerly from his village or extremists such as the Taliban are aware the applicant has played musical instruments in Australia.

15. The applicant does not claim to be a professional musician. He says he started playing music in Australia because he was lonely and took up music as a hobby and a way to socialise. He plays with others in private places, and does not perform publicly. I accept he may want to continue playing musical instruments in Pakistan. He says he learnt to play the [Instrument 1] as a young man in Pakistan, but had to do it when his father and older brother were not there because they disapproved. He says playing musical instruments is considered an undesirable or low class activity, and only certain people, such as musicians who perform at weddings, are allowed to do it. However, the fact that he had a [Instrument 1] in his house and was able to learn how to play it suggests there was some support within his family to play music. He has not provided any country information to support the claim that playing musical instruments was culturally unacceptable or disapproved in his community. Even if his father, older brother or local community were against music, there is nothing to indicate he was harmed or prevented from doing so in the past. I do not accept he faces a real chance of harm from his family or local community for playing musical instruments. I consider it too remote to amount to a real chance that the Taliban or any other extremist group would become aware that he was playing musical instruments at home and target him for this reason.
16. I accept the applicant is Turi Shia from Kurram Agency. I accept that when the applicant left Pakistan in 2013 there had been significant sectarian violence in Kurram Agency. There have been longstanding tensions between Shia and Sunni tribes in Kurram Agency, which have occasionally descended into violence. The disputes began as tribal disputes over access to land and resources, but took on a more sectarian nature with the radicalisation of Sunnis and Shias from the 1980s. The conflict was driven by disputes between tribes, the Taliban's desire to access Afghanistan through Kurram Agency, and the presence of Sunni extremist groups in the FATA with anti-Shia agendas. There was a significant escalation of tribal and sectarian violence between 2007 and 2011. Between 2009 and 2013 there was a spike in profiling and targeting Shias travelling on the main roads in Kurram Agency, particularly on the Tall-Parachinar Road that connects Parachinar to Peshawar.¹ The applicant says in his village the Shia and Sunni families had lived together peacefully in the past, however the Sunnis relocated from the village because of the level of conflict at that time. The applicant claimed that his home village was attacked on at least one occasion by the Taliban, [when] his family had to flee to a safer area. I accept these claims are plausible as they are consistent with the country information.
17. Overall the situation has greatly improved since the applicant left Pakistan in 2013. From 2014 the Pakistani government introduced a number of measures to combat terrorism and other violent attacks in Pakistan. In June 2014 they launched an operation called Zarb-e-Azb, targeting terrorists, separatist and criminal groups. The operations included paramilitary security forces and intelligence operations. After the attack by the Taliban on the Army School in Peshawar in December 2014, in which 132 children were killed, the Pakistani authorities also introduced a National Action Plan (NAP). The NAP and military operations formed a civil-military effort to combat terrorism and other violence across Pakistan. The NAP, inter alia, established military courts to try suspected militants, targeted the financing of militant groups, took measures to restrict hate speech, and committed to policy reform, particularly in the FATA. I acknowledge there was a spike in violence in early 2017 with three significant attacks in Parachinar, killing at least 120 people. These included: an explosion in a market on 21

¹ DFAT, Country Information Report Pakistan, 20 February 2019; Marian Abou Zahad, 'It's just a Sunni-Shiite thing': Sectarianism and Talibanism in the FATA of Pakistan, 2013; Middle East Institute, Sunni Deobandi-Shi'i Sectarian Violence in Pakistan: Explaining the Resurgence since 2007, December 2014.

January 2017; a suicide attack at an imambargah (Shia place of worship) on 31 March 2017; and a twin bombing in a market on 24 June 2017. However since June 2017 there have been no reported attacks in Parachinar. The Pakistani authorities introduced further military operations in 2017 (Raddul-Fasaad and Operation Khyber-IV).² The operations have had a significant positive impact, including disrupting the activity of militant groups and limiting their access to former safe havens. Groups such as the Taliban and al-Qaeda reportedly left the former FATA and many other militants were killed or fled to Afghanistan³. The continuous anti-militant operational and surveillance campaigns by security forces, police counterterrorism departments, and some of the counter-extremism actions taken under the NAP, are credited with sustaining a significant declining trend in violence and weakening of terrorist groups in Pakistan since 2013.⁴ There is no information before me to suggest the Pakistani authorities intend, in the foreseeable future, to cease such actions to combat terrorism or other violence across Pakistan.

18. As a consequence of the civil-military efforts to combat terrorism and sectarian violence, the Kurram Agency has enjoyed an extended period of calm since mid-2017. The Pakistan Institute for Peace Studies (PIPS) reported only one incident in 2018 in Kurram Agency, where 7 members of a family died when their vehicle struck a landmine.⁵ DFAT reported the Turi community claimed there were 2 incidents in 2018, although the incidents are not further described.⁶ The FATA Research Centre (FRC) reported Kurram Agency remained peaceful in 2019.⁷ The Center for Research and Security Studies (CRSS) reported no fatalities in Kurram Agency in 2019, and that the 6 year downward trend in terrorism and count-terrorism related fatalities continued.⁸ There are no reports before me of any incidents of sectarian violence in which Turi Shias or other Shias in Kurram Agency died in sectarian violence in 2019 or 2020, and even the one incident in 2018, where a vehicle hit a landmine, lacks detail of whether there was a sectarian motive involved.
19. The applicant claimed he heard from his family that ISIS was a problem in the Kurram Agency. He did not provide any statements or detailed information from his family or community, or any country information to support this. On the information before me, I am not aware of any attacks by ISIS in the area, but there were reports of leaflets being dropped in the Kurram Agency containing threats from ISIS in 2017.⁹ There is no information to indicate those threats were acted upon. DFAT reports ISIS has been present in Pakistan in Balochistan and northern Sindh, but does not report any ISIS activity in Kurram Agency or the broader province of Khyber Pakhtunkhwa.¹⁰ I do not accept, on the basis of the country information before me, that ISIS is currently active in Kurram Agency or likely to be in the foreseeable future given the military presence and continuing counter-terrorism operations. However I have taken ISIS in account when assessing whether as a Turi Shia in Kurram Agency the applicant faces a real chance of harm from extremist groups with an anti-Shia agenda.
20. DFAT assessed in February 2019 that there was a low risk of sectarian violence for Shias in the former FATA, but that the risk was higher in Parachinar. This assessment appears to be based on the events in Parachinar in 2017, and the concentration of Turi Shias in that city. It is now

² DFAT, Country Information Report Pakistan, 20 February 2019; EASO, Pakistan Security Situation, 30 October 2019.

³ EASO, Pakistan Security Situation, 30 October 2019.

⁴ PIPS, Pakistan Security Report 2019 – Foreword and Overview, 5 January 2020.

⁵ PIPS, Pakistan Security Report 2018, 6 January 2019.

⁶ DFAT, Country Information Report Pakistan, 20 February 2019.

⁷ FRC, Khyber Pakhtunkhwa Tribal Districts Annual Security Report 2019, 13 January 2020.

⁸ CRSS, Annual Security Report 2019, 28 January 2020.

⁹ News International, Daesh leaflets in Kurram Agency threaten a specific sect, 8 February 2017

¹⁰ DFAT, Country Information Report Pakistan, 20 February 2019.

more than 16 months since the DFAT report was published, and there have been no reported attacks against Turis or other Shias in Parachinar or Kurram Agency since. I note DFAT also reported there had been a trend of increased security, a reduction of fear in the community, and a confidence to again travel on the main Tall-Parachinar Road.

21. The applicant's parents and [brothers] have remained in the home village in Kurram Agency, with his [sisters] also living in nearby villages. One brother has gone to [Country 1] for work. There is no claim or evidence anyone in his family has been harmed by the Taliban, ISIS or any other militant or extremist group since the applicant left Pakistan. He disclosed that his family travel frequently to Peshawar, as his mother has [a medical condition] and requires treatment for this at a hospital there every month or two. His father or brother usually accompany the mother to her hospital appointments, and stay over in Peshawar. There is no claim they have even been harmed or threatened travelling from their village to Peshawar. Their ability to travel without incident in Kurram Agency is consistent with the country information referred to above about the improved security conditions in the area.
22. I conclude that significant changes have occurred in Kurram Agency, and the country of Pakistan, since the applicant left in 2013. There has been a significant reduction in sectarian violence in Kurram Agency as part of the overall downward trend in the number of terrorist attacks in Pakistan. The authorities have instituted successful military operations to target militant and extremist groups, have weakened and displaced those groups, implemented security measures to protect the city of Parachinar, and taken administrative actions such as merging the former FATA into the province of Khyber Pakhtunkhwa. When the applicant left in 2013 I accept he had a subjective fear. But taking into account the measures put in place, the long decline in sectarian violence, and the calm in Kurram Agency over an extended period of time, I find the chance of the applicant facing harm from the Taliban, ISIS, or any other Sunni or extremist group, because he is a Turi Shia in a village near Parachinar in Kurram Agency, is too remote to amount to a real chance.
23. The applicant claimed he would be targeted by the Taliban because he lived in a western country. DFAT assesses returnees to Pakistan do not face a significant risk of violence or discrimination from their attempt to migrate or because they lived in a western country. Western influence is pervasive in Pakistan, with many Pakistanis having relatives in western countries and aspirations themselves to migrate to the west. English is one of Pakistan's two official languages, and western films and music are widely available. Over 6 million Pakistanis live outside of Pakistan, with significant numbers living in the United States and United Kingdom. Many thousands return to Pakistan from western countries without issue. Wealthy Pakistani families commonly choose to send their children to western countries to be educated.¹¹
24. Taking into account the decrease in Taliban activity in Kurram Agency I consider it farfetched the Taliban would even be aware the applicant was returning from the west, and I do not accept they would take an adverse interest in him for this reason. I find the applicant does not face a real chance of harm from the Taliban, or anyone, because he is returning from a western country.
25. Even considering the applicant's claims cumulatively, taking into account his religion, tribe, village in Kurram Agency, time in the west and his music hobby, I conclude his chance of harm in his village near Parachinar in the Kurram Agency is the same as for other ordinary Turi Shias living in that area. For reasons given above, I consider that in the improved security conditions

¹¹ DFAT, Country Information Report Pakistan, 20 February 2019.

an ordinary Turi Shia does not face a real chance of harm, and I do not accept his personal factors of playing music and returning from the west give rise to a higher profile. I find the applicant does not face a real chance of harm for the reasons claimed, either individually or cumulatively, if he returns to his village in Kurram Agency, Pakistan, in the reasonably foreseeable future.

Refugee: conclusion

26. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

27. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

28. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
29. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
30. I have not accepted the applicant was threatened or targeted in the past as a student, or more recently for playing musical instruments. I do not accept he faces a real risk from the Taliban based on these alleged threats, when I do not accept he was in fact threatened or individually targeted.
31. The applicant stated he had become used to a western lifestyle and would find it difficult to live in Pakistan again. At the SHEV interview he gave examples such as being able to go to night clubs, drink alcohol, and mix with women. It may be these activities will not be available to him in his home village. I do not accept however that the lack of a 'western lifestyle' would amount to significant harm as defined in s.36(2A).
32. I have found the applicant does not face a real chance of harm for reason of his religion, being a Turi Shia from a village near Parachinar, playing musical instruments, or returning from a western country. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant does not face a real risk of significant harm for any or the reasons claimed, either individually or cumulatively.

Complementary protection: conclusion

33. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.